United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

75-7278

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- X

REBECCA REYHER and RUTH GANNETT,

Appellants,

v.

CHILDREN'S TELEVISION WORKSHOP and TUESDAY PUBLICATIONS, INC.,

Appellees.

- X

On Appeal from the United States District Court for the Southern District of New York

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REPLY BRIEF OF APPELLANTS

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TABLE OF CASES

STATUTE

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The fallacy of both the decision of the court below and Appellees' Brief is the misplaced assumption that there was a public domain source for the claimed infringing work of defendants.

No evidence of any public domain source was introduced at the trial of the case below.

The most that can be said to support the defendants' contention is that Mrs. Reyher testified at trial that her copyrighted book was based on a story told her by her Russian mother and that she believed (although no direct evidence was adduced to this effect) the story was a folktale (Finding of court below A-8, S.A.14).

Appellees' Brief asserts that Mrs. Reyher "testified

that she merely retold the story as told to her by her mother without claiming that she had added anything to the story or changed it in any significant way" (Appee. Br. p. 3). Even this statement is contradicted by the following actual testimony of Mrs. Reyher which is cited in Appellee's Brief and set forth in the Supplemental Appendix:

> "I couldn't remember the story that my mother told me . . .
>
> ". . . I have taken a story line, but I have adapted it and that's the synonym for retold and that's why I raise no objection to retold. It's my treatment. That's what the book is, even though it was my mother's story." (S.A.5)

Cases in this Circuit and elsewhere have consistently held that the mere speculation, or even fact that a work has a folk or public domain source neither invalidates a claimant's copyright nor an action for infringement unless the alleged infringer can show that he consulted and relied on an independent source. Italian Book Co. v. Rossi, 27 F.2d 1014 (S.D.N.Y. 1928); Hartfield v. Peterson, 91 F.2d 998, 1000 (2 Cir. 1937); Banks v. McDivitt, 2 Fed. Cases 759, Case 961 (S.D.N.Y. 1875); Toksvig v. Bruce Publishing Co., 181 F.2d 664, 667 (7 Cir. 1950); Mills Music v. Cromwell Music, 126 F.2d 54, 74 (S.D.N.Y. 1954); Wihtol v. Wells, 281 F.2d 550, 553, 554 (7 Cir. 1956) [all cited in Appellant's Brief].

Defendants failed completely to produce any such independent source. They conceded that there was no other

English-language source or version of plaintiffs' story (A.68). Defendants did not produce either a Russian or a German written version or any evidence that the author of the alleged infringing work, Jon Stone, had consulted any other English, Russian or German source, or that he knew any other language than English.

Moreover, the argument in Appellees' Brief on the issue of plaintiffs' work being a "derivative" work and therefore copyable is equally fallacious. Even if it were assumed that Mrs. Reyher had before her a Russian work which she translated literally word by word (which was not the testimony), she would still be entitled to complete copyright protection for her translated work and defendants would have no right to use her translated copyrighted work as a basis for another work. 17 U.S.C. §7 (see Appee. Br. p.7). Cf. Sheldon v. Metro-Goldwyn Pictures Corporation, 81 F.2d 49, 54 (2 Cir. 936). Even if plaintiffs' work were shown to be derivative in that it was a translation of an identifiable work in the public domain, the material may not be copied directly from the derivative work without liability even if the particular arrangement or other original contribution in the derivative work is not copied. Jeweler's Circular Pub. Co. v. Keystone Pub. Co., 281 Fed. 83 (2 Cir. 1922); Hartfield v. Peterson, 91 F.2d 998 (2 Cir. 1937); Banks v. McDivitt, supra; Yale University Press v. Row, Peterson & Co., 40 F.2d 290 (S.D.N.Y.

1930); see C. S. Hammond & Co. v. International Globe Inc., 210 F.Supp. 206, 218 (S.D.N.Y. 1962) [defendant showed it went back to identified public domain source]; Leon v. Pacific Telephone and Telegraph Co., 91 F.2d 484 (9 Cir. 1937).

Defendants' "bootstrap" argument conveniently omits reference to any other source than plaintiffs' for the structure, story line, sequence of events, idea, and language used in the Sesame Street version of Mrs. Reyher's story. There is accordingly a strangeness to defendants' conflicting contentions that

> "appellants' work is derived from a public domain folktale retold without change" (Resp. Br. p.8).

and

> "appellants' work consists entirely of translating a Russian language folktale."

If Mrs. Reyher translated a folktale, she ipso facto changed it from one language to another. But what did she change? There was no evidence adduced by either side of that much-referred-to folktale and we return to Mrs. Reyher's testimony that whatever story she heard from her mother was so long ago she couldn't remember it, viz.:

> "Q. [on cross examination] Now without going into Russian translations, can you please tell me the story, to the best of your recollection, that your mother told you when you were a child?
>
> A. I couldn't possibly tell you the story that my mother told me when I was a child. I am a great-grandmother and my mother told

> me hundreds of stories. I couldn't remember the story that my mother told." (S.A.4,5)

Thus the argument in Appellees' Brief under Point II (pp. 8-12) must fall with the fallacy of its premise -- the premise being that Mrs. Reyher's copyright protects "only . . . the material contributed by the author . . . as distinguished from the preexisting material employed in the work" (p. 8). Which preexisting material? We are never told and the record is bare of any evidence of the nature and content of such material.

Harold Lloyd Corp. v. Witwer, 65 F.2d 1 (9 Cir. 1953) cited by the court below and in Appellees' Brief [p.8] S.A.16) is inapposite since the court in Lloyd found (contrary to the findings of the court below, that there was a similarity between plaintiffs' story and defendants' version):

> "We think . . . it would not occur to such a spectator in the absence of suggestion to that effect, that he was seeing in moving picture form the story or any part of the story of 'Emancipation of Rodney' [plaintiffs' work]." (65 F.2d 27, 28)

Similarly the court in Costello v. Loews Corporation, 159 F.Supp. 782 (D.C.D.C. 1958) found that

> "there is no similarity between the defendant's picture and the protected original portions of plaintiff's work, considering them always in the light most favorable to plaintiff's contention." 159 F.S. 782 at 786.

Appellees' Brief continues to assert without any foundation in the law or the record that:

> "Mrs. Reyher has consistently maintained that she merely retold the folktale previously told to her. She added nothing and changed nothing in the bare bones story sequence." (Appees. Br. p.11)

If defendants' position and that of the court below is correct, the copyright law is an illusion since it provides no protection against deliberate imitation and copying.

CONCLUSION

The decision of the court below should be reversed.

Respectfully submitted,

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